

United States
Court of Appeals
For the Ninth Circuit

N. B. GIUSTINA and EHRMAN GIUSTINA,
as Co-Executors of the Estate of
ERMINIO GIUSTINA, Deceased, and
IRENE GIUSTINA, et al.

Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appellants' Brief

On Appeal from the United States District
Court for the District of Oregon

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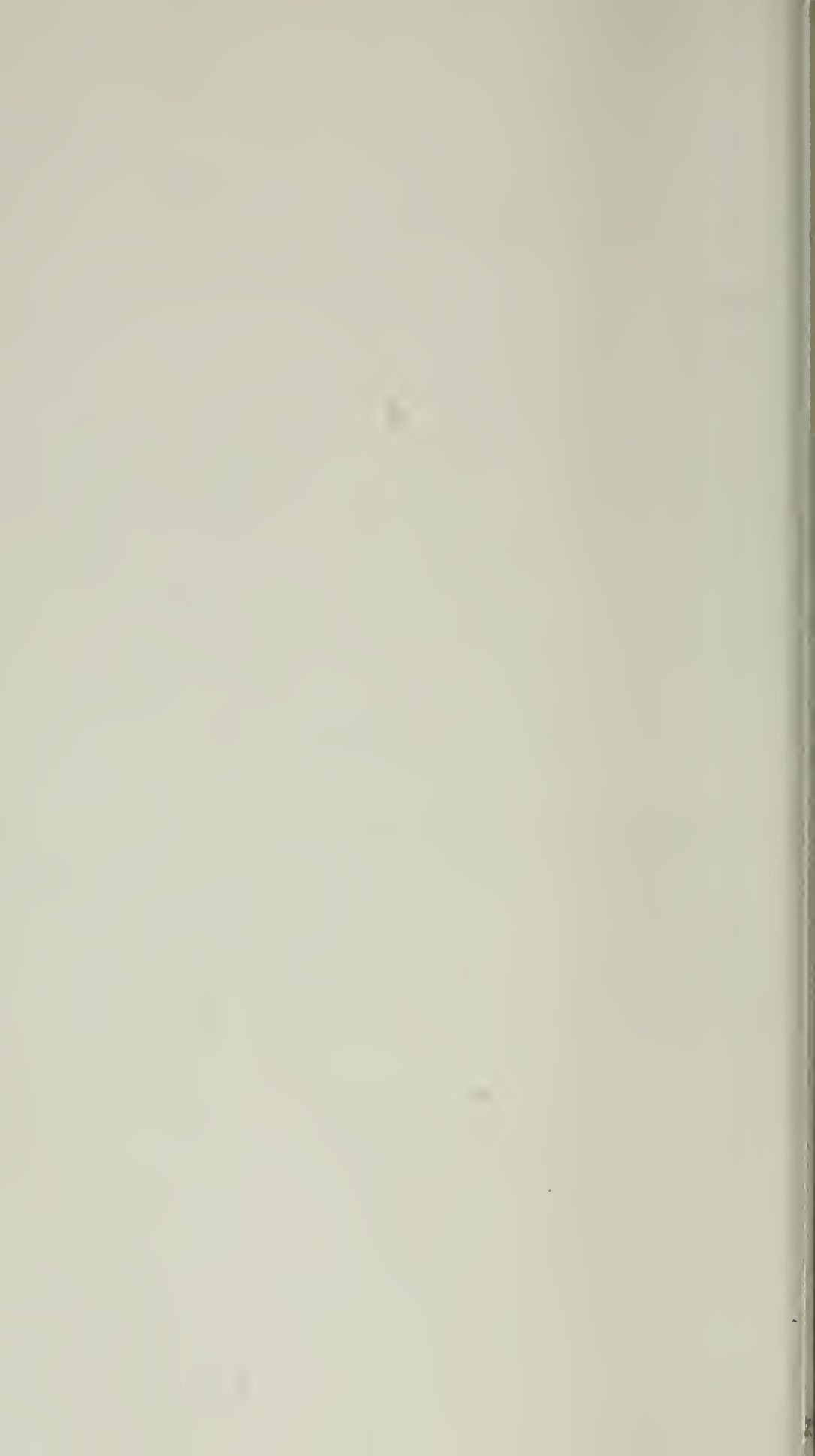
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JURISDICTION

These are income tax refund cases. As appears in more detail in the statement of the case below, the District Court had jurisdiction under Title 28, U.S. Code, Section 1346, and this Court has jurisdiction of the appeals under Title 28, U. S. Code, Section 1291.

OPINION BELOW

The opinion of the District Court was handed down by Judge John F. Kilkenny. He found for Appellee. The opinion is reported at 267 F. Supp. 40.

CONSOLIDATION

These civil actions all involve the same items of law and fact (except for the amounts requested refunded); all of said civil actions were consolidated for consideration in the District Court, and are covered by the same opinion. Accordingly, appellants moved this Court for limited consolidation of all of said civil actions with respect to record, briefing and argument.

STATUTES INVOLVED

1954 Internal Revenue Code, Section 164 (a):

“(a) General Rule.—Except as otherwise provided in this section, there shall be allowed as a deduction taxes paid or accrued within the taxable year.”

1954 Internal Revenue Code, Section 631 (b):

“(b) Disposal of Timber With a Retained Economic Interest.—In the case of the disposal of timber held for more than 6 months before such disposal, by the owner thereof under any form or type of contract by virtue of which such owner retains an economic interest in such timber, the difference between the amount realized from disposal of such timber and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, on the sale of such timber. * * * ”

1954 Internal Revenue Code, Section 1231 (a):

“(a) General Rule.—If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business * * * exceed the recognized losses

* * * such gains shall be considered as gains * * * from sales or exchanges of capital assets held for more than 6 months. * * *"

1954 Internal Revenue Code, Section 1231 (b) (2):

"(b) (2) Definition of Property Used in the Trade or Business.—For the purposes of this section * * *

"(2) Timber, Coal or Domestic Iron Ore.—Such terms includes timber, coal and iron ore with respect to which Section 631 applies."

QUESTION PRESENTED

Whether under the circumstances here the partnership (consisting of the appellants herein) which granted to the corporation the right to cut and remove timber from certain timber tracts owned by the partnership was entitled to capital gains treatment on amounts received from the corporation to the extent that these amounts represented real property taxes paid by the corporation on all timber lands covered by the timber-cutting contract.

STATEMENT OF THE CASE

Giustina Brothers partnership (sometimes referred to as "the partnership"), consisting of the individual appellants herein, was organized on April 1, 1947.

On July 1, 1948 the partnership entered into a contract with Giustina Brothers Lumber Company (sometimes referred to as "the corporation") an Oregon corporation controlled by the partners during the years in

suit, but not at the time the contract was made. At the time of entering into the contract, the partners collectively owned approximately 45 per cent of the stock of the corporation. A copy of this contract appears as Exhibit A, R. pp. 26 et seq.

This contract was later modified by a supplementary agreement entered into on April 1, 1957 between the partnership and Giustina Brothers Lumber Company. A copy of this supplementary agreement appears as Exhibit B, R. pp. 46 et seq.

The contract provided for the sale by the partnership to the corporation of certain standing timber, said timber to be cut and removed by the corporation.

The corporation, in addition to other considerations to be paid for the timber, agreed to pay the real property taxes on all timber lands covered by the contract.

In actual practice, the partnership paid the taxes and then received reimbursement from the corporation.

The partnership claimed a deduction from ordinary income for the real property taxes paid by it for the taxable years here involved.

When the partnership was reimbursed by the corporation for the real property taxes paid by it, it treated such reimbursements as amounts realized from the disposal of timber and increased its capital gains realized from the disposal of timber.

The Commissioner of Internal Revenue determined that the reimbursements received were not amounts realized from the disposal of timber within the meaning of §631(b), Internal Revenue Code of 1954, and treated the reimbursements as ordinary income.

These adjustments gave rise to deficiencies which were assessed against the individual plaintiffs. These deficiencies were paid, together with interest, and timely claims for refund were filed by the individual plaintiffs. These claims were rejected by statutory notices of disallowance, and the instant actions were timely brought.

SPECIFICATION OF ERROR

The lower Court erred in not allowing the partners as sellers to treat as a part of the selling price payment of liens for property taxes against the timber involved, which tax liens were paid pursuant to the contract by the corporate buyer.

ARGUMENT

Under the contract of 1948 (R., pp. 26 et seq.) and under the supplemental contract of 1957 (R., pp. 46 et seq.) the members of the partnership as sellers and the corporation as buyer agreed to purchase a very substantial amount of timber from the sellers' lands, to-wit: 150,000,000 board feet of merchantable timber situated on extensive parcels of land (R., pp. 26 and 42 et seq.).

As part of the sales and purchase price the corporate buyer agreed to pay the real property taxes which ac-

crued as liens up to the time that the buyer had completed logging the particular parcel involved (R., pp. 26 and 28 et seq). The buyer had the option of selecting the particular parcel or parcels to be logged. It was only reasonable, prudent and the crystal-clear intent of the parties that the buyer should remove the tax liens from the property involved which by reason of the contract the sellers were restrained from selling to any other party and which the buyer could log immediately or after some years.

Upon the facts and the statutes this is a somewhat unique case, and no decision directly and entirely in point has been found. However, tax consequences are determined by economic realities, and both the intent of the parties and the statutes are clear that as to the sellers the payments of the tax liens charged to the buyer were a part of the consideration received for capital gain purposes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial Court should be reversed and the refunds allowed.

Respectfully submitted,

WILLIAM E. DOUGHERTY
Attorney for Appellants

CERTIFICATION

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

/s/WILLIAM E. DOUGHERTY

WILLIAM E. DOUGHERTY,

Attorney for Appellants.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I have made service of the foregoing brief, together with the attached certificate, on the appellee herein, by depositing in the United States Post Office at Portland, Oregon, on the — day of ———, 1967, a duly certified, true, exact and full copy thereof, enclosed in an envelope with postage prepaid addressed to Sidney I. Lezak, United States Attorney, United States Courthouse, Portland, Oregon, 97207, and by depositing a like copy in a like envelope addressed to G. Ben-Horin, Tax Division, Department of Justice, Washington, D.C. 20530, attorneys for appellee.

/s/WILLIAM E. DOUGHERTY

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